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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE,	C068270
Plaintiff and Respondent,	(Super. Ct. No. 95F07905)
v.	
TIMOTHY LADRY JASPER,	
Defendant and Appellant.	

Following a jury finding that defendant Timothy Ladry Jasper currently posed a substantial danger to others as a result of a mental disorder, the trial court extended defendant's mental health commitment for two years.

On appeal, defendant contends: (1) the testimony of the People's expert violated the confrontation clause and could not be used for the truth of the matter; (2) there was no evidence defendant had a qualifying mental disorder or was unable to control his dangerous behavior; (3) the court erred in allowing the jury to learn that its verdict would decide whether defendant would be released or continue to be confined; and

(4) the court erred in supplementing (after closing arguments) the instructions it had previously given. Disagreeing with these contentions, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant was committed to Napa State Hospital some years after a 1995 burglary that resulted in a finding of not guilty by reason of insanity. At the time of trial, Dr. Domingo Laguitan had been a staff psychiatrist at Napa State Hospital for almost six years and had been defendant's treating psychiatrist for 14 months. In that capacity, the doctor had formal meetings with defendant once a month and observed him most days.

Dr. Laguitan was part of a multidisciplinary treatment team assigned to defendant, the goal of which was to provide for the needs of defendant so he could "move onto an open unit and hopefully to get out of the hospital." The treatment team, including Dr. Laguitan, was responsible for documenting in the hospital's medical records defendant's day-to-day progress, as well as anything significant. The record entries were made by the treatment team, including Dr. Laguitan, as a normal course of business and recorded contemporaneous acts and events. Accessing, reviewing, and creating these records were part of Dr. Laguitan's job responsibilities.

Dr. Laguitan diagnosed defendant with substance abuse disorder, substance-induced psychosis, and antisocial personality disorder. He based these diagnoses on defendant's history, which included, among other things, 30 years of drug

abuse (that continued in Napa State Hospital, despite its serious measures to prevent drugs from entering the hospital), a history of auditory hallucinations that began in his early teens, a history of criminal behavior (that coincided with the onset of the hallucinations and drug use), and the following incidents:

In August 2008, after defendant had ingested narcotics, he appeared restless and was talking to himself. He refused to follow the staff's direction and gestured to the staff that there was somebody under his bed when in fact there was no one there.

In October 2008 (during a time period when defendant was refusing to undergo drug testing), defendant threatened to kill people who he believed were coming through the metal bars on his window trying to harm him.

In April 2009, during an incident "induced by substances," defendant told another patient while defendant was looking under that patient's mattress, "'I'm going to fuck you up.'" Defendant was then put in a locked room by himself, but he kept kicking at the door and threatening to hurt others.

In December 2009 (again during a time period defendant was refusing to undergo drug testing), there was an incident where defendant was in his room, disheveled with his eyes red, slow to respond, and looked at staff suspiciously.

Finally, there was an incident in July 2010 when defendant approached a staff member with his voice hoarse and eyes red while clenching his fists and angrily stating, "'I'll kill one

of those motherfuckers. I'm going to smash one -- what doing my room [sic]. I'll kill somebody tonight.'" When the staff asked what was going on, he accused the staff of playing dumb.

In conversations with Dr. Laguitan, defendant admitted to the auditory hallucinations, a substance abuse problem that has affected his life, and the use of drugs at Napa State Hospital because he was bored and depressed at being housed there for so long.

DISCUSSION

I

*The Testimony Of The People's Expert Did
Not Violate The Confrontation Clause And Could
Be Used For The Truth Of The Matter Stated*

Defendant contends the testimony of Dr. Laguitan violated the confrontation clause and could not be used for the truth of the matter stated. His contention is based on *Crawford v. Washington* (2004) 541 U.S. 36 [158 L.Ed.2d 177], *People v. Hill* (2011) 191 Cal.App.4th 1104 and *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, superseded by statute as stated in *People v. Gonzales* (2011) 51 Cal.4th 894, 927, and raises federal and state law arguments. As we explain, none of defendant's arguments have merit.

In *Crawford*, the United States Supreme Court held that under the confrontation clause, "[t]estimonial statements of witnesses absent from trial" are admissible "only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine [the witness]." (*Crawford v.*

Washington, supra, 531 U.S. at p. 59 [158 L.Ed.2d at p. 197], fn. omitted.) *Crawford's* confrontation clause analysis focusing on the testimonial nature of out-of-court statements has given rise to Sixth Amendment concerns about expert testimony that depends for its value on the truth of testimonial statements by nonwitnesses. (See *People v. Hill, supra*, 191 Cal.App.4th at pp. 1134-1137 [disagreeing with cases holding *Crawford* does not apply to hearsay that forms the basis of an expert's opinion, but finding that most of the hearsay relied upon by the gang expert in *Hill* would not be considered testimonial under *Crawford* and finding that it also was bound to follow California Supreme Court precedent that held gang experts may properly relate in detail the hearsay on which they relied].)

The problem with defendant's reliance on *Crawford* and *Hill* is that the medical reports to which Dr. Laguitan testified were not testimonial within the meaning of *Crawford*. The United States Supreme Court has stated that "medical reports created for treatment purposes" are "not . . . testimonial" within the meaning of *Crawford*. (*Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305, ___, fn. 2 [174 L.Ed.2d 314, 322, fn. 2.]) For example, our Supreme Court has distinguished between statements made to a treating physician, which are not testimonial, and statements made to police after the emergency had passed and not made to assist in treatment when medical personnel were already attending to the witness, which are testimonial. (*People v. Cage* (2007) 40 Cal.4th 965, 984-985, 987-988.)

Here, the records were created for defendant's medical treatment. Dr. Laguitan testified that statements in defendant's hospital records were made to record defendant's day-to-day progress from the treatment team's perspective. The goal of the treatment team was to provide for the needs of defendant so he could "move onto an open unit and hopefully to get out of the hospital."

In arguing that the medical records were testimonial within the meaning of *Crawford*, defendant also relies on *Verdin v. Superior Court, supra*, 43 Cal.4th at page 1112, in which the appellate court stated, "the statements petitioner would make in a court-ordered mental examination would unquestionably be testimonial." *Verdin* is inapplicable for two reasons. One, defendant's medical records were not generated pursuant to a court-ordered medical examination. Rather, they were generated to keep track of defendant's day-to-day progress with an eye to getting defendant out of the hospital. And two, *Verdin* was not analyzing what was testimonial under the Sixth Amendment's confrontation clause analysis but rather what was testimonial under Penal Code section 1054.4, which states, "Nothing in this chapter shall be construed as limiting any law enforcement or prosecuting agency from obtaining nontestimonial evidence to the extent permitted by law on the effective date of this section." The *Verdin* Court noted, "Because we are interpreting a statute in this case, our reference to constitutional principles should not be considered definitive or binding in a case where

application of the constitutional privilege itself is directly at issue." (*Verdin*, at p. 1112, fn. 6.)

Defendant's argument under state law fares no better. He argues that "expert opinion that relies solely on hearsay of which the expert has no personal knowledge does not constitute evidence to support the judgment, [and] has no value unless the hearsay it relates is true." Defendant's argument is based on a flawed factual and legal premise.

His argument is flawed factually because Dr. Laguitan's opinion was not based exclusively on hearsay of which he had no personal knowledge. Rather, he was defendant's treating psychiatrist for 14 months. In that capacity, the doctor had formal meetings with defendant once a month and observed him most days. As Dr. Laguitan's patient, defendant admitted to the doctor he had auditory hallucinations, suffered from a substance abuse problem that has affected his life, and was tempted to and indeed did use drugs at Napa State Hospital because he was bored there and depressed at being housed there for so long.

His argument is flawed legally because hospital records can be admitted under the business records exception to the hearsay rule when properly authenticated. (*Garibay v. Hemmat* (2008) 161 Cal.App.4th 735, 742; see Evid. Code, § 1271.) Sufficient authentication was provided by Dr. Laguitan's testimony. The doctor testified that the record entries were made by the treatment team, including himself, as a normal course of business and recorded contemporaneous acts and events.

II

There Was Sufficient Evidence Defendant Had A Qualifying Mental Disorder And He Was Unable To Control His Dangerous Behavior

Defendant contends there was no evidence he had a qualifying mental disorder or was unable to control his dangerous behavior.¹ As we explain, he is wrong on both fronts.

A

There Was Substantial Evidence

Defendant Had A Qualifying Mental Disorder

Defendant contends that Dr. Laguitan's diagnosis that defendant had substance-induced psychosis was insufficient to establish the required mental disorder. He argues this is so because "mere drug use and its symptoms" do not meet the definition of substance-induced psychosis. According to defendant, to qualify as a committing disorder, the substance-induced psychosis must be a psychosis that continues even after the effects of the drug have worn off, citing *People v. Kelly* (1973) 10 Cal.3d 565.

Kelly held that prior to November 1994, a person who was voluntarily intoxicated could be found legally insane if the intoxication caused a mental disorder that remained after the

¹ A defendant's commitment can be extended only if "by reason of a mental disease, defect, or disorder [the defendant] represents a substantial danger of physical harm to others" (Pen. Code, § 1026.5, subd. (b)(1)) and the defendant has serious difficulty in controlling dangerous behavior (*People v. Galindo* (2006) 142 Cal.App.4th 531, 533, following *In re Howard N.* (2005) 35 Cal.4th 117).

effects of the drug had worn off: “[S]ettled insanity produced by a long-continued intoxication affects responsibility in the same way as insanity produced by any other cause. But it must be “settled insanity,” and not merely a temporary mental condition produced by recent use of intoxicating liquor.” (People v. Kelly, supra, 10 Cal.3d at p. 576, italics omitted.)

In 1994, the Legislature passed Penal Code section 25.5, which provides in part: “In any criminal proceeding in which a plea of not guilty by reason of insanity is entered, this defense shall not be found by the trier of fact solely on the basis of . . . an addiction to, or abuse of, intoxicating substances.” Penal Code section 25.5 changed the rule of *People v. Kelly* by erecting an absolute bar prohibiting use of one’s voluntary ingestion of intoxicants as the sole basis for an insanity defense, regardless whether the substances caused organic damage or a settled mental defect or disorder which persists after the immediate effects of the intoxicant have worn off. (*People v. Robinson* (1999) 72 Cal.App.4th 421, 427.)

Kelly is inapplicable. To qualify for an extended commitment, defendant must have “a mental disease, defect, or disorder.” (Pen. Code, § 1026.5, subd. (b)(1).) Here, Dr. Laguitan testified defendant had one (actually, three, but right now we discuss just one). Specifically, Dr. Laguitan diagnosed defendant with substance-induced psychosis. He explained the disorder appeared in the DSM-IV, a diagnostic book compiled by the American Psychiatric Association that enumerates all the diagnoses and assigns a certain criteria to describe the

diagnosis. It is a book used by those in the mental health system so there is consistency and standardization of diagnosis. Dr. Laguitan explained that psychosis is a break in reality that comes in different forms including hallucinations (hearing or sensing things that are not there) or delusions (false beliefs that an individual still holds on to despite rational evidence to the contrary).

Dr. Laguitan then recounted the evidence he used to reach his diagnosis. There was an incident in August 2008 when defendant, while on narcotics, was restless and talking to himself, refusing to follow the staff's direction, and gesturing to the staff there was somebody under his bed when in fact there was no one there. There was an incident in October 2008 (during a time period defendant was refusing to undergo drug testing), during which defendant was threatening to kill people who he unreasonably believed were trying to get him. There was an incident in April 2009 when defendant was under the influence and told another patient while looking under that patient's mattress, "'I'm going to fuck you up.'" There was an incident in December 2009 (again during a time period defendant was refusing to undergo drug testing), during which defendant was in his room disheveled with his eyes red, slow to respond, and looked at staff suspiciously. And there was an incident in July 2010 where defendant approached a staff member with his voice hoarse and eyes red stating, "'I'll kill one of those motherfuckers. I'm going to smash one -- what doing my room [sic]. I'll kill somebody tonight.'"

Finally, it mattered not, as defendant argues, that Dr. Laguitan testified that the substance-induced psychosis was in early remission, because there is an important distinction between remission and recovery. "An individual is in remission when '[t]here are no longer any symptoms or signs of the disorder, but it is still clinically relevant to note the disorder. . . . After a period of time in full remission, the clinician may judge the individual to be recovered and, therefore, would no longer code the disorder as a current diagnosis. The differentiation of In Full Remission from recovered requires consideration of many factors, including the characteristic course of the disorder, the length of time since the last period of disturbance, the total duration of the disturbance, and the need for continued evaluation or prophylactic treatment.' (American Psychiatric Assn., Diagnostic and Statistical Manual of Mental Disorders (4th ed. 2000 text rev.) p. 2.)" (*People v. Bartsch* (2008) 167 Cal.App.4th 896, 902-903.) Defendant had been diagnosed with substance-induced psychosis in early remission, but his treatment team had not yet described him as recovered. The presence of currently diagnosed conditions meant that the outcome of defendant's petition turned on the remaining factors necessary for continued commitment, including the inability to control his dangerous behavior, which we turn to next.

*There Was Sufficient Evidence Defendant
Was Unable To Control His Dangerous Behavior*

Defendant contends there was insufficient evidence he was unable to control his dangerous behavior because there was no evidence defendant had ever tried to control his behavior. He relies on this court's opinion in *People v. Galindo, supra*, 142 Cal.App.4th at page 531. *Galindo* involved a bench trial that predated *In re Howard N., supra*, 35 Cal.4th at page 117 (*Howard N.* added the requirement that a defendant must have a serious difficulty controlling his dangerous behavior). (*Galindo*, at p. 533). In *Galindo*, there was little evidence that the defendant tried to control his behavior, that he encountered serious difficulty when trying to do so, or that his difficulty was caused by his mental condition. (*Id.* at p. 539.) Rather, the evidence strongly suggested the defendant did not try to control his dangerous behavior because he perceived no reason to do so. (*Ibid.*) We concluded: "In short, the evidence was not such that any rational jury would have found that "[defendant] harbored a mental disorder that made it seriously difficult for him to control his [dangerous behavior] . . . [making] the absence of a 'control' instruction . . . harmless beyond a reasonable doubt." [Citation.]" (*Ibid.*) Because the trial in *Galindo* predated *Howard N.* (such that neither the parties, nor the witnesses, nor the court had the opportunity to consider the control issue), we remanded for a new trial. (*Galindo*, at p. 539.)

This is not the situation we have here. This was a trial that postdated *Howard N.* (so the jury was instructed it had to find that defendant had serious difficulty controlling his dangerous behavior) and the jury was presented with sufficient evidence of this element. Defendant told Dr. Laguitan that he was concerned about hurting or assaulting people when he was under the influence. He acknowledged "that drugs [are] his problem and it has affected his life." He tried to control this problem by completing at least two drug education programs at Napa State but those were "several years ago." More recently, his attendance at group meetings addressing drug abuse problems had not been consistent. Despite these drug abuse education classes and group meetings, defendant still ingested drugs at a locked hospital that had taken strict measures to keep drugs out and threatened staff and patients repeatedly when under the influence. This testimony provided sufficient evidence defendant had tried but could not control his dangerous behavior.

III

The Court Never Informed The Jury That Its Verdict Would Decide Whether Defendant Would Be Released Or Continue To Be Confined

Defendant contends the court erred in allowing the jury to learn that its verdict would decide whether defendant would be released or continued in confinement. In making this argument, defendant relies on case law holding that it is error for the court to instruct the jury that its verdict will determine whether a defendant should be released or confined. (See, e.g.,

People v. Kipp (1986) 187 Cal.App.3d 748; *People v. Collins* (1992) 10 Cal.App.4th 690.)

The problem with defendant's argument is that the court did not instruct erroneously. The alleged errors defendant points to were with the *prosecutor's statements in closing* that:

(1) "[w]ho's there to restrain him and to prevent him from hurting other people or himself" if he's out in the community; and (2) "When he gets out, if he gets out, what happens to him in the future is a question."² There was no objection to this argument, so any contention based on the prosecutor's error is forfeited. (*People v. Wilson* (2005) 36 Cal.4th 309, 359-360.)

IV

The Court Did Not Err In Supplementing The Instructions

Defendant contends the court erred in supplementing (after closing arguments) the instructions it had previously given with the following two instructions -- the jury was to view defendant's out-of-court statements with caution (CALCRIM No. 358) and the jury was not to base any true finding on defendant's out-of-court statements alone (CALCRIM No. 359).³

² The prosecutor followed that sentence immediately with, "The question for you to decide now: Does he have a mental disease or defect?"

³ The court instructed as follows:

"[A]fter the attorneys . . . concluded their argument, I decided that two other instructions may be helpful to you in your deliberation process, and so I'll give them to you at this time.

Defendant's argument in the trial court was that these instructions, while correct, allowed the jury to use defendant's out-of-court statements for the truth of the matter, where the prosecutor had not made it clear during the instruction conference that the prosecutor was relying on those statements for their truth. Defendant in the trial court argued that the court should not give these instructions relying on a "waiver and estoppel" theory that "if the instructions had . . . been different, [he] would have argued differently." Defendant further argued the People invited a mistrial. Defendant asked for "additional instruction to the jury that this instruction was not made available to either counsel at the time their

"You have heard evidence that the [defendant] made oral statements before the trial. You must decide whether the [defendant] made any such statements in whole or part. If you decide that the [defendant] made such statements, consider the statements along with all the other evidence in reaching your verdict.

"It's up to you to decide how much importance to give the statements. Consider with caution any statement made by the [defendant] tending to show that the petition is true, unless the statement was written or otherwise recorded."

"The petition may not be found true based on the [defendant's] statement alone. You may rely on the [defendant's] out-of-court statements to find the petition true if you conclude other evidence shows that the petition is true.

"That other evidence may be slight and need only be enough to support a reasonable inference that the petition is true.

"You may not find the petition to be true unless the petitioner has proved the truth of the petition beyond a reasonable doubt."

arguments were formulated." The court gave defendant the option of reopening his closing argument, which he did not do. The court, then, "over the defense objection, . . . [gave] [CALCRIM Nos.] 358 and 359."

Defendant on appeal argues the court should have granted his request to estop the People from changing its position and accepting the jury instructions as previously given, relying on the doctrines of judicial estoppel and equitable estoppel.

These doctrines do not apply here. As even defendant acknowledged in the trial court, the instructions to view a defendant's out-of-court statements with caution (CALCRIM No. 358) and to not base any true finding on defendant's out-of-court statements alone (CALCRIM No. 359) were correct statements of law. Indeed, the court was required to give these instructions *sua sponte* where, as here, there was evidence of incriminating out-of-court oral statements by defendant. (*People v. Beagle* (1972) 6 Cal.3d 441, 455.)

Moreover, the manner in which the court gave these instructions did not, as defendant now claims, "ma[k]e it look as though defense counsel w[as] being admonished by the court and had made some mistake." The court specifically took responsibility for the belated instruction: "[A]fter the attorneys . . . concluded their argument, I decided that two other instructions may be helpful to you in your deliberation process, and so I'll give them to you at this time."

Finally, to the extent defendant now argues the court had another option besides giving the two challenged instructions,

namely, barring the People from relying on defendant's statements, it is too late to raise that issue now. Nowhere during trial did defendant ask the court to consider this option, so he cannot raise it now.

DISPOSITION

The judgment (order extending commitment) is affirmed.

ROBIE, J.

We concur:

BLEASE, Acting P. J.

BUTZ, J.